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Supreme Court of the United States

OCTOBER TERM, 1962

NO. 314

ARNOLD SCHILDHAUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States Supreme Court and the Associate Justices Thereof:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed a judgment in favor of the respondent.

(a) The Opinion Below

The opinion of the District Court is reported at 211 F. Supp. 934, *sub. nom. United States* v. *Birngold Realty Co.*; the opinion of the Court of Appeals is reported at 316 F. 2nd 240 (see Appendix, pp. 1a-12a).

(b) Statement of Grounds of Jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on May 2, 1963. The mandate to the District Court was issued on May 17, 1963.

(ii) The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254.

(c) Questions Presented for Review

1. Where new contracts valid under New York law are entered into between the holder of three notes and the maker, which new contracts extend the time of payment of the three notes, vary the terms of all the notes including the amount payable monthly, and which new contracts agree "to hold all action versus all;" which contracts were made without the consent of the accommodation maker; is the court below in error in holding that the accommodation maker is nonetheless liable on the original notes.

2. Where a note is first negotiated after maturity of the note; is an accommodation maker whose contract it is to pay the notes at maturity or if in default before maturity liable to a purchaser who gives consideration for the notes two years after their maturity, and which purchaser four years after their maturity sues the accommodation maker.

3. Does the United States government when it purchases negotiable paper occupy a preferred position in the law of negotiable instruments; so that when it negligently and carelessly fails to refile chattel mortgages given to secure the payee and the accommodation maker as collateral, and as a result of such carelessness and negligence on the part of the United States, the petitioner (the accommodation maker) suffers a loss; are the lower courts right in assuming and holding that the United States occupies a preferred position and therefore its carelessness and negligence do not make the accommodation maker nonliable.

4. Where appellant is a guarantor under a contract of guaranty, does a new contract varying the terms, extending the time of payment, agreeing to "hold all action versus all" release the guarantor. Is the District Court correct in holding that this is merely an extension of time that has been waived. Is a difference of the amount of monthly payment in the new contract and the agreement not sure enough to release a guarantor?

(d) Statutes Relied On

The various sections of the Negotiable Instruments Law are set forth in the petition and appendix.

(e) Statement of Case

On October 31, 1950, Birngold Realty Corp. borrowed $3,227 from the National City Bank on a 5-year instalment note payable monthly. The appellant was an accommodation co-maker. The note expired by its terms on September 30, 1955. On February 19, 1957, the National City Bank assigned to the United States the matured note.

On December 30, 1951, Mae Ed Corp. borrowed $5,977.57 from the National City Bank on a 5-year instalment note payable monthly. The appellant was an accommodation co-maker. The note expired by its terms on November 13, 1956. The National City Bank assigned the matured note to the United States on February 19, 1957.

On December 29, 1952, Mae Ed Corp. borrowed from N. Rogozin Co. Inc. $2,992.71 on a 5-year instalment note payable monthly. The appellant was a guarantor. N. Rogozin Co. Inc. assigned the note without recourse to the National City Bank, and on March 4, 1957 the note was assigned by National City Bank to the United States.

In each transaction as part of the security for the loan, chattel mortgages on the boilers in each of these buildings where they had been installed were taken and filed by the

National City Bank; and were the reason appellant had become an accommodation maker and guarantor. Both Birngold Realty Corp. and May Ed Corp. sold their respective buildings; and as part of the contract of sale the new buyer covenanted that he would make the payments on these notes to the National City Bank. The contract of sale provided that in the event that he did not make such payments, the chattel mortgages could be foreclosed.

On Ju[illegible], 1955, the National City Bank notified all parties that because of failure to make the monthly payments, all 3 notes had been declared matured; and called for payment of the entire balance then due. Appellant went to the new owners and told them that if they did not pay the notes, appellant could and would foreclose his mortgages.

On August 2, 1955, the National City Bank entered into a new contract in writing (Exhibits 1, 2 and 3) in which on a payment of $850 it agreed to accept the balance in the future, agreed to accept monthly payments slightly more than in the other contracts and agreed to "hold all action versus all".

These agreements (Exhibits 1, 2 and 3) were exhibited to the appellant. He as a careful lawyer of some 30 years experience checked the agreement with National City Bank, and on the basis of what he thought the law was concluded that a new contract had been entered into; and that he was released. This was the last claimed notice given appellant of a default until some 4 years later when he was served with a summons and complaint.

The National City Bank, with its vast experience, had filed and refiled the chattel mortgages as required by New York law. After they were assigned to the United States, the United States carelessly and negligently failed to refile the chattel mortgages which were collateral security for the payee and the accommodation maker.

On March 6, 1962, the United States moved for summary judgment; appellant, on argument, cross-moved for summary judgment. On December 7, 1962, District Judge Edelstein granted the plaintiff's motion for summary judgment. On May 2, 1963, the Circuit Court of Appeals, Second Circuit, unanimously affirmed the judgment.

(f) Jurisdiction of the Courts Below

The District Court had jurisdiction under 28 U. S. C. 1335. The Court of Appeals had jurisdiction under 28 U. S. C. 1291.

(g) Reasons Certiorari Should be Granted

It is respectfully submitted that the decision of the District Court which was adopted by the Circuit Court of Appeals conflicts with the law of Negotiable Instruments as interpreted by the highest court of the state of New York and every other jurisdiction.

As to Question I

The first misconception and material misstatement in District Judge Edelstein's opinion was the treatment of the new contract as a variation in the terms of the original notes. Exhibits 1, 2 and 3 deal with matured notes. Exhibits 1, 2 and 3 extend the time of payment of the original notes, vary the amounts payable each month, take $850 as consideration for the variance in terms, and agree to "hold all action versus all."

District Judge Edelstein states in his opinion: "The accommodation maker being primarily liable is not discharged by an agreement binding the holder to extend the time of payment or by an agreement binding the holder to postpone his right to enforce the instrument." His support for that statement is a 1903 case decided by the Appellate Division, *National Citizen's Bank v. Toplitz*, 81 A. D. 593.

When that case reached the Court of Appeals, it stated (178 N. Y. 464, at p. 466):

> "Prior to the enactment of the Negotiable Instruments Law, it was the well settled rule in this state that a valid and binding agreement to extend the time of payment between the holder of a promissory note and the principal debtor without the knowledge or consent of the surety operated to release the latter provided the holder knew of his true relation to the note. Whether the rule has been changed by the Negotiable Instruments Law is a question that will have to be decided when it is fairly presented. To have the effect of discharging the surety, however, it has always been the rule that such an agreement must be upon a valid consideration and must be sufficient to preclude the creditor during the extended period from enforcing the debt against the principal (Olmstead v. Latimer, 158 N. Y. 313)".

Exhibits 1, 2 and 3 are three separate contracts in writing which by Section 33 (2) of the New York Personal Property Law were good and valid contracts. Every text writer including the eminent Professor Britton, *Bills and Notes* (2nd ed.) who on pages 702 to 705 collects all the authorities and Professors Beutel and Brannan, *Beutel's Brannan Negotiable Instruments Law*, who on pages 1114 to 1133 collect all the authorities agree that the accommodation maker is released by a new contract.

The cases cited in the opinion of District Judge Edelstein are (in the words of the New York Law Revision Committee (1955) Report on the Uniform Commercial Code a very good study of the New York Negotiable Instruments Law) at page 1059 of volume 2:

> "On the other hand, the Code's emphasis on the accommodation parties essential function as a surety might by interpretation, will result in the reversal of

> some lower court decisions in New York which have declined to recognize suretyship defenses as available to accommodation parties who are primary parties" (cites cases cited by District Judge Edelstein.)

It is respectfully submitted that the learned Court's decision that a new contract made after the maturity of the notes between the maker and the holder without the consent of the accommodation maker, varying the terms of the note and precluding the creditor during the extended period from enforcing the debt against the principal or the accommodation maker, does not release the accommodation maker, is not good law.

As to Question 2

Professor Britton, *Bills and Notes* (1st ed., pp. 966-968; 2nd ed., pp. 600-602) asks the question:

> "May an accommodation party whether liable primarily or secondarily be held liable by the holder who first gave value after maturity?"

These are the facts in the instant case. Professor Britton, after collecting and citing the authorities concludes:

> "the accommodating party is not liable to the holder for value after maturity."

District Judge Edelstein in his opinion does not discuss this question. His decision assumes that holder in due course and holder for value are synonymous, they are not. His decision assumes that a matured negotiable instrument is governed by the Negotiable Instruments Law. He then combines them and assumed that since a holder for value is the same as a holder in due course, the negotiation by the payee of the note for the first time after maturity would give the purchaser the status of a holder in due course of a

negotiable instrument, and that defenses are not available because of the Negotiable Instruments Law. It is respectfully submitted that each of the statements are error. The accommodation maker agrees to pay a note at maturity or if in default before; he does not agree to pay a note two years after the maturity of the note to a person with knowledge of the fact that the accommodation maker is an accommodation maker.

As to Question 3

The Supreme Court of the United States has said in *St. L. B. & M. Ry.* v. *U. S.* (268 U. S. 169, 173):

> "And the rule is well settled that, when the government * * * comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same law that govern individuals there."

A long line of decisions support this statement: *U. S.* v. *Bank of the Metropolis*, 15 Pet. 377; *U. S.* v. *Barker*, 12 Wheat. 559; *Cooke, et al* v. *U. S.*, 91 U. S. 389, 396; *Standard Oil Co.* v. *U. S.*, 267 U. S. 76; *Chesapeake & Delaware Canal Co.* v. *U. S.*, 250 U. S. 123, 126; *U. S.* v. *National Exchange Bank of Baltime*, 270 U. S. 527; *Lynch* v. *U. S.*, 292 U. S. 571, 579; *Perry* v. *U. S.*, 294 U. S. 330, 352.

If that is so; an excellent summary of the New York law is given by the New York Law Revision Commission Report on the Uniform Commercial Code (1955) vol. 2, p. 1186 which states:

> "Section 201 of the N. Y. N. I. L. (U. N. I. L., section 120) does not expressly preserve the law of suretyship, that a creditor's surrender of security in the principal debtor's property discharges a surety pro tanto, it nowhere embodies the other special surety's defenses; but the uniform act in subdivision

(5) and (6) of section 120, 'obviously indicates the intention of the draftsman to sweep into the law of bills and notes the complete system of the surety's special defenses' (Britton, Bills and Notes (1943) p. 1096). Professor Britton also argues that if this reasoning be not accepted, the same result can properly be reached on the basis that suretyship law with its special defenses, is all preserved by U. N. I. L., section 196 (N. Y. N. I. L., section 7) which provides that 'In any case not provided for in this act, the rules of the law merchant shall govern' (Britton, op. cit., section 292 especially page 1098).

"This section 3-606 (1) (c) although it is a new codification of the principal of defenses resulting from impairment of security works no change in existing law in this respect (See Exchange Bank v. Ludlum, 246 A. D. 892; and Cohen v. Rossmore, 225 A. D. 300)."

Both the District Court and the Circuit Court of Appeals ignored this point; even though it was conceded that the failure of the plaintiff to refile the chattel mortgage through negligence and carelessness unjustifiable impaired the collateral for the instrument given by the maker for the benefit of the accommodation maker and the holder.

As to Question 4

The new contract entered into (Exhibit 3) after the maturity of the note released the appellant who was the guarantor of that note. The learned Court below argues that this was not a new contract but merely an extension of time which by the terms of the note guarantor had waived. But this new contract did more than extend the time of payment, it changed the terms of the original contract. It states:

"Terms of Arrangement 200.00 binder to pay 50.00 mo. to hold all action versus all Date 8/2/5 Made by G. C. Faigel Matured Loan Number 27 M 3522-002 Borrower Mae Ed Corp."

This is more than a mere extension of time, it changes all the terms of the note. A contract of guaranty under New York law is "*strictissimi juris.*" Any change of terms makes the guarantor not liable. This is ancient law which is still law (*Bacon* v. *Chesney*, 1 Stark N. P. R. 192; *Miller* v. *Stewart*, 9 Wheat 680; *Grant* v. *Naylor*, 4 Cranch 224; Brandt on Suretyship, 3rd ed., section 106; Restatement of the Law of Security, Section 158; *Becker* v. *Faber*, 280 N. Y. 141.

CONCLUSION

It is respectfully submitted that error was committed by the courts below which calls for the exercise of the Supreme Court's power of supervision over the Federal courts.

Respectfully submitted,

ARNOLD SCHILDHAUS,
Attorney for Petitioner, Pro se.

APPENDIX.

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 148-349

UNITED STATES OF AMERICA,

Plaintiff,

against

BIRNGOLD REALTY COMPANY, MAE-ED COMPANY, ARNOLD SCHILDHAUS and SHEERY SCHILDHAUS,

Defendants.

EDELSTEIN, *D. J.*

Before the court are cross motions for summary judgment, Rule 56(c), Fed. R. Civ. P.[1] The Government, as assignee of the Federal Housing Administrator, has brought suit on three negotiable promissory notes insured under the provisions of the National Housing Act, as amended, 12 U. S. C. § 1702 *et seq.* (Supp. III, 1962). Jurisdiction is based on 28 U. S. C. § 1345 (1958).

On February 2, 1962, the parties filed a stipulation as to certain material facts concerning which there was no gen-

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[1] On argument the defendant orally cross-moved for summary judgment. Although Rule 7(b)(1), Fed. R. Civ. P. requires that motions "shall be in writing," there is authority permitting resort to an oral motion when the opposing party does not object. 2 Moore, *Federal Practice* 1544 (2d ed. 1961); *Tudor* v. *Leslie*, 35 F. Supp. 969 (D. Mass. 1940). Although a written motion would obviously have been the better practice, the expedient of an oral motion was permitted herein since the court's conclusion, based on its independent examination of the file, is in accord with the concession of the parties.

uine issue. Subsequently, on oral argument, the defendant conceded that there was no genuine issue as to any material fact. An analysis of the file reveals that there is indeed no genuine issue of material fact. See *Empire Electronics Co. Inc. v. United States* (=27549, 2nd Cir. November 23, 1962). Accordingly, this suit is ripe for adjudication by summary judgment. The decision turns on the resolution of a legal issue that opens the way for the determination of all the parties' subsidiary contentions which are discussed, *infra*. That issue—whether the defendant Schildhaus, is a primary or secondary obligor on the respective notes—necessitates the application of the law of negotiable instruments in order to determine where, within the nomenclature of that case-hardened body of law, the relationship of the parties abides. Once having resolved the problem of classification of the parties within the law of negotiable instruments, their respective rights, duties, and liabilities flow freely therefrom. The facts are as follows:

As to the causes of action relating to the first two notes, the facts are essentially similar, except for date and amounts due.

On October 31, 1951, the defendant Arnold Schildhaus executed and delivered a negotiable promissory note payable to the order of the First National City Bank of New York (hereinafter referred to as the Bank), in the amount of $3,227.39. Schildhaus signed the note twice, once as President of Birngold Realty Corporation, the corporation whose name appears on the note as borrower, and again individually, as co-maker of the note. On December 13, 1951, the defendants Mae Ed Corporation and Arnold Schildhaus executed a second negotiable promissory note payable to the order of the Bank in the amount of $3,077.57. Schildhaus again signed the note both as President of Mae Ed Corporation and then individually as co-maker.

Memorandum

Prior to the delivery of the notes Arnold Schildhaus executed and signed Federal Housing Administration Title I Credit Applications. The applications were executed and signed by Schildhaus as President of both corporations, Birngold Realty Corporation and Mae Ed Corporation. Both corporations passed resolutions, properly sealed and signed by their respective Secretary, Sherry Schildhaus, authorizing their President, Arnold Schildhaus, to borrow, "in his individual capacity," the face amount of the notes for the benefit of the corporation.[1] The resolutions were prepared by Arnold Schildhaus and parts of each of them were executed in his own handwriting. Thereafter, defaults occurred in the payment of each of the notes and the plaintiff reimbursed the payee and holder, the Bank, in the amount of $120.51 on the first note and $1,480.21 on the second note, the respective balances due. The notes were thereupon duly endorsed and assigned to the plaintiff by the Bank and plaintiff is now their owner and holder. Schildhaus was duly notified by the Bank of the default in the payment of each of the notes and admits "having heard" of the defaults. After default, but before assignment to the plaintiff, the time within which to make the installment payments were extended, and in fact, two additional payments were made on each note. By the terms of the notes notice of dishonor and default were expressly waived, and, as the Bank was the holder of the notes, presentment to the maker was not required. N. Y. Negotiable

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[1] The pertinent parts of the corporate resolutions of Birngold Realty Corporation and Mae Ed Corporation read as follows: "WHEREAS, Arnold Schildhaus (signature) proposes to borrow in his individual capacity from the Personal Credit Department of the NATIONAL CITY BANK OF NEW YORK a principal amount of ..... Dollars, but for the benefit of this Corporation and the proceeds of such loan to be payable to this Corporation (NOW THEREFORE ***" Exhibits 4 and 9

Memorandum

Instruments Law, § 130; *Haskell* v. *Lason*, 31 N. Y. S. 2d 729 (1941). Upon default and prior to their being negotiated to the plaintiff, the notes were called at the option of the Bank and the balances became due.

As to the third note, on or about December 27, 1952, the defendant Mae Ed Corporation executed and delivered a negotiable promissory note, payable to the order of N. Rogozin Company, in the amount of $2,092.71. The defendant Schildhaus executed this third note as President of Mae Ed Corporation and at the same time guaranteed the payment of the note. The guaranty, a printed provision on the reverse side of the note, provided that "time of payment of said note, or of any of the indebtedness evidenced or represented thereby, may be extended, without notice to or further assent from the undersigned (or any of us), who will be and remain bound upon their guaranty notwithstanding any such extension." Moreover, notice of dishonor and default were expressly waived in the guaranty. Thereafter, but before maturity, the note was duly endorsed and delivered for value to the Bank by the Rogozin Company. A default occurred in the payment of the installments whereupon the note, at the option of the Bank, became due. The holder was reimbursed by plaintiff for the balance due pursuant to its insurance obligation under the National Housing Act, as amended, 12 U. S. C. § 1703 (Supp. III, 1962). The Bank was the holder in due course of said note and presentment to the maker was not required. N. Y. Negotiable Instruments Law, § 130.[1] The defendant Schildhaus was notified of the default by the Bank and again admits "having heard" of the default on this note. After the default, but before negotiation of

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[1] N. Y. Negotiable Instruments Law, § 130. *Effect of want of demand on principal debtor.*

"Presentment for payment is not necessary to charge the person primarily liable on the instrument. * * *"

Memorandum

this third note to the United States, the time within which the installment payments were to be made was extended and two additional payments were made. There is $1,253.27 due on the third note.

The signature of the defendant Sherry Schildhaus also appears on the first two notes as co-maker, but she was not served with process. This action is, therefore, against the corporations and against Arnold Schildhaus, individually, as accommodation co-maker for said corporations. There is no question as to the liability of the corporations.

Schildhaus contends that his status on the first two notes is that of an "accommodation party," and that therefore he is a surety for his two corporations and only secondarily liable for their obligations. From this premise the defendant proceeds to the next contention that the extensions of time granted without his consent to the makers by the Bank varied the terms of the original notes and thereby discharged his secondary obligation as surety. He also argues that the fact that the notes were assigned to plaintiff after they were overdue deprives the Government of status as a holder in due course and that further, defendant, as an accommodation party, is not liable to a mere holder for value who takes the note after maturity.

The Government concedes that the assignment of the notes after their maturity prevents it from qualifying for the position of a holder in due course. N. Y. Negotiable Instruments Law, § 91.[1] It contends, however, that its in-

[1] N. Y. Negotiable Instrument Law, § 91. *What constitutes a holder in due course.*

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. * * *

"2. That he became holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact."

ability to acquire holder in due course status does not prevent it from recovering the balances due. The Government claims that by virtue of acquiring its title to the instruments from a holder in due course, without being a party to any fraud or illegality affecting the instrument, it has succeeded to all the rights of the prior holder as against a co-maker. And it rejects defendant's characterization of himself as an accommodation party who is duly secondarily liable, and contends that the defendant Schildhaus is an accommodation co-maker whose primary liability is not discharged by a variation in the terms of the original agreement.

The resolution of the issues of law raised by these contentions depends upon the application of the Negotiable Instruments Law of New York, and the decisional law thereunder. *United States* v. *Hansett*, 120 F. 2d 121 (2d Cir. 1941); *United States* v. *Tholen*, 186 F. Supp. 346 (N. D. Iowa 1960); *United States* v. *Brownlee*, 168 F. Supp. 42 (E. D. N. Y. 1958). If defendant's basic premise—that he is an accommodation party or accommodation endorser and consequently only secondarily liable—were well founded, the contentions bottomed thereon would follow with facility. More specifically, acceptance of defendant's claim that he was an accommodation endorser would prevent the imposition of any liability on him, since the extensions of the times for payment would have discharged his obligations on the notes. N. Y. Negotiable Instruments Law § 201(6),[5]

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[5] N. Y. Negotiable Instruments Law § 201. *When persons secondarily liable are discharged.*

* * * *

"6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

But the defendant's basic premise is untenable and this defect in the foundation of defendant's legal theory renders the contentions bottomed thereon unsupportable. It is clear from the exhibits submitted in support of plaintiff's motion that Schildhaus was not an endorser on the first two notes but a co-maker with his corporations. The corporate resolutions in each case authorized Schildhaus to "borrow in his individual capacity" the amounts of the notes for the benefit of the corporations. Exhibits 22 and 24, entitled "Credit Statement of Co-maker" were executed and signed by Schildhaus. They refute his claim that the legal effect of these writings was to provide him with endorser status. Moreover, Schildhaus signed the face of both notes on the line designated for the co-maker of each. The New York decisions have long settled the proposition that an accommodation co-maker is primarily liable on the instrument and is not liable merely as a surety. *National Citizen's Bank* v. *Toplitz*, 81 N. Y. S. 422, *Aff'd*, 178 N. Y. 464, 71 N. E. 1 (1903); *Stricks* v. *Siegal*, 138 Misc. 266, 245 N. Y. S. 372 (1930); *Haskell* v. *Lason*, *supra*; *Meadowbrook National Bank of Nassau Co.* v. *Dunning*, 208 N. Y. S. 2d 321 (1960); cf. *In re Craven's Will*, 171 Misc. 825, 13 N. Y. S. 2d 987 (1939). The accommodation maker, being primarily liable, is not discharged by an agreement binding the holder to extend the time of payment or by an agreement binding the holder to postpone his right to enforce the instrument. *National Citizen's Bank* v. *Toplitz*, *supra*; *Stricks* v. *Siegal*, *supra*; *Haskell* v. *Lason*, *supra*; *Meadowbrook National Bank of Nassau Co.* v. *Dunning*, *supra*. The rationale of *Toplitz* is that the accommodation maker is, in reality, the principal debtor since by signing as maker he holds forth his credit for the express purpose of inducing the lender to extend the loan. A contrary rationale would permit a primary obligor to elude his obligation by a self-styled re-characterization of his role. See *Vernon Center State*

Memorandum

Bank v. Mandelsen, 166 Minn. 472, 208 N. W. 186 (1926), 48 A. L. R. 710 (1927). It is evident that in the instant case Schildhaus' obligation on the first two notes was that of a principal debtor. His execution of the co-maker's statement, the corporate resolution authorizing him to borrow the funds on his own personal liability and his signature as "co-maker" on the face of the notes all point to the conclusion that Schildhaus undertook a primary obligation as co-maker for the benefit of his corporations. The defenses available to those secondarily liable, such as the defense of extension of time, are not available to Schildhaus. N. Y. Negotiable Instruments Law, § 201(6). Furthermore, defendant does not have any defense under § 200 of the Negotiable Instruments Law, which enumerates the grounds for discharging parties primarily liable. He does not claim cancellation or payment which are defenses under that section.[6]

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[6] N. Y. Negotiable Instruments Law, § 200. *Instruments: how discharged.*

"A negotiable instrument is discharged

"1. By payment in due course by or on behalf of the principal debtor;

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"3. By the intentional cancellation thereof by the holder;

"4. By any other act which will discharge a simple contract for the payment of money;

"5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Memorandum

Section 206 of the N. Y. Negotiable Instruments Law,[7] as applied in *Haskell* v. *Lason*, *supra*, is equally unavailing to the defendant. In *Haskell*, the court held that the defense of extension of time for payment was not available to an accommodation co-maker but only to a surety. Notations were written on the face of the note in the *Haskell* case extending the time of payment from June 4, 1938, to December 4, 1938, and thereafter, to June 4, 1939. Hence, these written extensions of time constituted material alterations within the meaning of § 206 of the N. Y. Negotiable Instruments Law. The holder's action for summary judgment was denied in order that the circumstances of the extensions could be re-examined and so that there could be a determination on remand, of whether the maker was discharged as a result of these alterations. Even if *Haskell* v. *Lason* can be interpreted as holding that a written extension of time on the face of the instrument constitutes a material alteration so as to discharge persons not consenting thereto, the decision is inapplicable to the notes herein on which no

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[7] N. Y. Negotiable Instruments Law, § 206. *What constitutes a material alteration.*

"Any alteration which changes:

"1. The date;

"2. The sum payable, either for principal or interest;

"3. The time or place of payment;

"4. The number or the relations of the parties;

"5. The medium or currency in which payment is to be made;

"Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

such written extensions or alterations appear. See *James Employees Credit Union* v. *Hanley*, 2 Wis. 2d 490, 87 N. W. 2d 299 (1958).

Moreover, although the plaintiff was not a holder in due course of the first two notes, its status is that of a holder for value as a result of having obtained its title from a holder in due course without having been a party to any fraud or illegality affecting the instrument. N. Y. Negotiable Instruments Law, § 52;[1] *United States* v. *Hansett*, *supra*; *United States* v. *Brouwer*, *supra*; *United States* v. *Costa*, 105 F. Supp. 599 (W. D. Pa. 1952); *United States* v. *Warshaw*, 61 F. Supp. 678 (E. D. N. Y. 1945); *United States* v. *O'Hara*, 46 F. Supp. 780 (E. D. Mich. 1942); *United States* v. *Dobrowolski*, 16 F. R. D. 134 (D. Md. 1954). Section 55 of the New York Negotiable Instruments Law provides that an accommodation maker is liable to a holder for value, notwithstanding that at the time of taking the instrument, the holder for value knew him to be an accommodation party.[2] It is evident that the defendant is liable to the plaintiff as a holder for value on the first two notes.

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[1] N. Y. Negotiable Instruments Law, § 52. *What constitutes holder for value*.

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

[2] N. Y. Negotiable Instruments Law, § 55. *Liability of accommodation party*.

"An accommodating party is one who has signed the instrument as maker, drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

Memorandum

As to the third note, the defendant Schildhaus was the guarantor of the obligation of the Mac Ed Corporation. Defendant has argued that he is not liable on the third note because notice of dishonor was not given and presentment for payment was not made. In addition, he reiterates the claim that he was a surety on the note and was discharged by the extensions of the time for payment given without his consent. Exhibits 17, 18 and 20, submitted on the motion, demonstrate that the defendant was in fact given proper notice of the default on each of the three notes. Notices of the default were sent to the addresses indicated by defendant in his application papers. Defendant, moreover, admits that he "heard" of the default. Even assuming *arguendo* that the notices were not given, this lapse would not be fatal since the defendant's obligation on the contract of guaranty was direct and unconditional. Notice of dishonor and presentment were thus not necessary. *Sverdin v. Coaltown Fuel Corp.*, 111 N. Y. S. 2d 672 (1952); *Staga Tool and Die Corp. v. Weisman*, 12 App. Div. 99, 208 N. Y. S. 2d 585 (1960). Furthermore, by the terms of the first and second notes, and by the guaranty on the reverse side of the third note, notice of dishonor and default were explicitly waived. Finally, by the express wording of the guaranty the defendant Schildhaus waived any defense that he might have had resulting from the extension of time. The guaranty provides:

> "(the undersigned) consents that the time of payment of said note or of any of the indebtedness evidenced or represented thereby, may be extended, without notice to or further assent from the undersigned (or any of us), who will and remain bound upon this guaranty notwithstanding any such extension(s)."

Memorandum

Although defendant, as a guarantor, could have been discharged on his obligation by reason of the extension of time, *Metropolitan Capital Corporation* v. *Janus*, 25 Misc. 2d 37; 196 N. Y. S. 2d 805 (1960), the waiver of the right to take advantage of the extensions is dispositive of this contention.

The plaintiff's motion for summary judgment is granted as to all three notes.

Dated: New York, N. Y. December 7, 1962.

DAVID N. EDELSTEIN,
U. S. D. J.

The Opinion of the Circuit Court of Appeals, Second Circuit

PER CURIAM:

Judge Edelstein's determination in a careful and reasoned opinion, reported at 211 F. Supp. 934 (S. D. N. Y. 1962) *sub. nom. United States* v. *Birngold Realty Co.* that appellant was liable to the United States as primary obligor on the first two notes and guarantor on the third with notice thereon waived, is clearly correct and the judgment is affirmed.

Exhibit 1

PAYMENT BOOK

Bal 620

This book is furnished for your convenience to save you time in making your payments on your matured loan.

Payments may be made at any branch listed on back cover. *Always bring this book.*

Payments may also be made by mail, send check with ticket. *Do not mail this book.*

Follow instructions inside cover if payment is made by mail.

TERMS OF ARRANGEMENT 250.00 binder to pay 50.00 mo. to hold all action versus all.

DATE 8/2/5 MADE BY G. C. Faigel

MATURED LOAN
NUMBER 30M3600-005 BORROWER Birngold Realty Corp.

PERSONAL CREDIT DEPARTMENT

The National City Bank of New York
17 E. 42nd Street
New York 17, N. Y.

SEAL

Do Not Mail This Book 20

If necessary to write or 'phone please mention your Account Number.

Exhibit 2

Identical to Exhibit 1 in all respects except the following:

TERMS OF ARRANGEMENT 400.00 binder to pay 100.00 per mo. to hold all action.

DATE 8 2/5 MADE BY G. C. Faigel

MATURED LOAN NUMBER 13M3601-007 BORROWER Mae Ed. Corp.

Exhibit 3

Identical to Exhibit 1 in all respects except the following:

TERMS OF ARRANGEMENT 200.00 binder to pay 50.00 mo. to hold all action versus all.

DATE 8 2/5 MADE BY G. C. Faigel

MATURED LOAN NUMBER 27M3522-002 BORROWER Mae Ed Corp.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 314

ARNOLD SCHILDHAUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Pet. App. 1a-12a) is reported at 211 F. Supp. 934, *sub nom. United States* v. *Birngold Realty Co.*. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 12a) is reported at 316 F. 2d 240.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1963. The petition for a writ of certiorari was filed on July 27, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

699-205—63

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner was released from his obligation as accommodation co-maker or guarantor of three notes insured under the provisions of the National Housing Act by reason of (i) an arrangement between the holder and the principal obligor regarding time and amount of installment payments, (ii) negotiation of the notes after maturity to the United States, or (iii) an alleged failure on the part of the United States to refile chattel mortgages securing the notes.

STATEMENT

This is an action brought by the United States on three installment notes, the unpaid principal balances of which are $120.51, $1,480.21 and $1,253.27. These notes were issued in favor of a lender financial institution, insured under the provisions of the National Housing Act, 48 Stat. 1246, as amended, 12 U.S.C. 1702, and assigned to the government after default (App. 3a–7a).[1] The loan underlying each of the notes was made to a corporation of which the petitioner was President. The first two notes were signed by petitioner twice, once as President of the borrowing corporation and again as an individual co-maker (App. 18a, 19a, 24a, 38a). The third note was signed by petitioner only as President but was also guaranteed by him individually.

The first two notes, after specifying the dates on which monthly payments were due, provided that pay-

[1] Citations to "App." refer to Appellee's Appendix in the United States Court of Appeals for the Second Circuit, which has been filed as part of the record in this Court.

ments could be made "at such other times as may be agreed in writing by and between the Bank and any of the undersigned" (App. 24a, 38a). The guaranty in the third [illegible] provided that the time of payment "may be extended, without notice to or further assent from the undersigned" (App. 60a).

The corporation defaulted on each note and the bank declared the remaining principal to be due. Notice was given to petitioner. Upon the payment of certain lump sums, the bank agreed to accept the then remaining balances in monthly installments differing slightly from the installments as originally specified in the notes (App. 24a, 38a, 60a; Pet. App. 13a, 14a).

After further default, the United States fulfilled its insurance obligations, took an assignment of the notes, and instituted this action. The district court entered judgment for the government, holding that petitioner was liable on all three notes. The court rejected petitioner's argument that he was released from the notes by the extensions of time granted by the bank.

The court of appeals, rejecting the same contentions, affirmed on the basis of the district court's opinion.

ARGUMENT

Petitioner raises four issues relating to the law of negotiable instruments which he asserts should be reviewed by this Court. He has not shown, however, that these issues have any general importance; that there is any conflict among the federal courts; or

that the district court's disposition of the case was erroneous.

The district court decided the case as a matter of New York law, while the court of appeals affirmed without stating explicitly whether federal or state law was applicable. Our view is that, under *Clearfield Trust Company* v. *United States*, 318 U.S. 363, federal law is applicable to the question of the defenses available on an FHA-insured note, and that this type of case is not one in which federal law should necessarily adopt local law as the rule of decision. Cf. *United States* v. *Helz*, 314 F. 2d 301 (C.A. 6) (federal law governs question of whether United States can recover against a married woman on an FHA-insured note). However, it does not appear that any of the sources from which a federal rule might be fashioned would support a different result, on the facts of this case, from that reached by the courts below.

1. In support of his contention, with respect to the first two notes, that he was released by the extensions of time, petitioner relies principally upon two treatises, both of which criticize the rule applied by the courts below but acknowledge that it is the majority rule (Pet. 6). Whether the federal courts should adopt the minority rule and hold that an accommodation co-maker is released by an extension of time to which he does not consent might be an interesting question in another case, although it seems doubtful that a federal rule should be fashioned which would give accommodation co-makers a defense against the United States not available in the majority of states.

In this case it appears that the first two notes provided for payment "at such other time as may be agreed in writing by and between the Bank and any of the undersigned" (App. 24a, 38a). Thus it is clear that petitioner, by signing the note, consented to an extension of time as agreed to by the bank and the corporation. Accordingly, the question which petitioner would raise is not actually presented.

2. Contending that the government should not be able to sue an accommodation co-maker on notes negotiated to it after maturity, petitioner again relies upon a commentator who notes a split of authority on this point (Pet. 7). The view taken by this commentator (and by some state courts) is that a prohibition against negotiation after maturity is an implied term of the agreement between an accommodation co-maker and the payee. Here, however, the courts could not, on any view of the law, imply such a restriction. Petitioner executed Federal Housing Administration Title I Credit Applications in connection with these notes (App. 26a, 40a, 64a, 18a-21a). As its regulations make plain, the Federal Housing Administration insures this type of note by agreeing to purchase upon default after maturity. 24 C.F.R. 200.177, 200.178. Thus petitioner can hardly argue that an implied term of *his* agreement with the Bank was a prohibition against negotiation to the Federal Housing Administration after maturity.

3. Petitioner's contention that he was released from his obligations by an alleged failure of the United States to refile chattel mortgages securing the notes has no factual basis in the record before this Court.

Moreover, even on petitioner's assumption, it would not follow that the courts below erred. It is not alleged that plaintiff released the collateral, but merely that the chattel mortgages were not refiled. Since failure to refile a chattel mortgage in New York affects validity only as against third parties (Section 235, New York Lien Law), and there is no reason to suggest that this failure should have any different effect under federal law, there would be no impairment of collateral unless the present obligors on the mortgages had become insolvent or had resold or remortgaged to a purchaser or mortgagee taking in good faith. There is no allegation that any of these events has occurred. Nor is there any allegation as to the value of the collateral and the extent of any impairment that may have taken place.

4. Petitioner's final contention relates solely to his guaranty of the third note. He apparently concedes, as he must, that he consented in advance that "the time for payment * * * may be extended" (App. 60a). He then attempts to avoid the effect of this concession by arguing that the Bank "changed the terms of the original contract," and that this is accordingly not "merely an extension of time." What the Bank did was to agree, upon payment of a binder of $200, to accept monthly payments of $50 on a note originally providing for monthly installments of $49.89. (App. 60a, Pet. App. 14a). Petitioner fails to point out that a "mere extension of time," as he defines it, would have extended the period for payment past the point provided for in the Bank's arrangement and would thus have increased petitioner's

risk as guarantor. Plainly, then, the contention is without substance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1963.

U.S. GOVERNMENT PRINTING OFFICE

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IN THE

Supreme Court of the United States

October Term, 1963

No. 311

ARNOLD SCHILDHAUS,

Petitioner,

v.

UNITED STATES OF AMERICA

REPLY BRIEF

As to Point 1 of Respondent's Brief in Opposition

The minority rule on which petitioner relies (p. 6 of Petition) has been made the law by the Uniform Commercial Code adopted by 18 states including New York. The question presented, conceded by respondent to be interesting (p. 4, Respondent's Brief), is whether the federal courts will adopt the law as set forth in the Uniform Commercial Code.

As to the contention first raised in this Court that "payment at such times" etc. (p. 5 of Respondent's Brief), it is a tortured attempt to answer an unanswerable argument. The clause has no reference to a new contract made after the notes had been declared by the holder "matured".

As to Point 2 of Respondent's Brief (p. 5)

No argument is advanced that the holder was prohibited to negotiate the notes after their maturity, but that after the maturity of the notes by the passage of time, the accom-

modation maker is not liable. The so-called minority rule (p. 7 of Petitioner's Brief) has been adopted by the Uniform Commercial Code.

As to Point 3 of Respondent's Brief (p. 5)

Argued in all courts was that the failure to refile the chattel mortgages released the accommodation maker (see p. 13 of Government's Brief in Circuit Court of Appeals). Section 235 of N. Y. Lien Law provides that chattel mortgages which are not refiled shall be invalid against creditors, purchasers or mortgages. These mortgages were made in 1950 to 1952, and the Government first sued in 1959. The building in these years had been sold and resold.

As to Point 4 of Respondent's Brief (p. 6)

It is petitioner's contention that the doctrine of "stricti s simi juris" applies. After the note had been declared matured by the holder, the holder entered into a new contract agreeing to accept $200 of the $350 then due, and varied each and every term of the original note.

I would be a fool if I didn't recognize that in a court as busy as the Supreme Court it would be physically impossible to correct all erroneous decisions in the various Federal courts. However, a surprising number of professors from various universities including some of the most eminent, expressed their interest, and in writing for records and briefs urged this petition. I have followed their advice.

ARNOLD SCHILDHAUS,
Attorney, pro se.